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Death Penalty Drugs: A Prescription That's Getting Harder to Fill

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DEATH PENALTY DRUGS:

A Prescription That's Getting Harder to Fill



By Corinna Barrett Lain
Illustrated by Katie McBride



ix states have abolished the death penalty in the past six years—Illinois, New York, New Jersey, Connecticut, Maryland, and New Mexico. We haven't seen mass moves like that since the 1960s. What gives?

Part of the answer is that those states weren't executing anyway. More people in those states were dying on death row waiting to be executed than were actually being executed, and the death penalty is breathtakingly expensive to maintain (a point to which I'll return in a moment).

So why weren't the states executing? We tend to hear about innocence claims, trench warfare litigation, official moratoriums, study commissions, and the like. But there's another phenomenon that has quietly wreaked havoc in the administration of the death penalty in the United States: the dearth of death penalty drugs.

Here's the backstory.

Until recently, lethal injection was carried out by a three-drug concoction that included a drug called sodium thiopental, which, as it turns out, had just one domestic producer—a company called Hospira. But Hospira didn't want its product used for executions. It manufactures drugs to “improve or save lives,” not to end them, so it asked states not to use its product for that purpose. But the states didn't honor its request. So Hospira concluded that the best way to prevent what it termed the “misuse” of its drug in executions was to stop making it altogether. And that's what Hospira did.

That led to all sorts of problems as death penalty states started looking abroad for alternative suppliers of the drug. Pharmaceuticals in Germany make sodium thiopental, but they refused to sell it for use in lethal injections. A Swiss pharmaceutical company makes sodium thiopental, but it said no, too—and then asked Nebraska for its “wrongfully diverted” supply back.

Great Britain is also a producer of sodium thiopental, but it banned the export of lethal injection drugs to the United States and urged the European Union to do the same, which it did. Under the EU's new rule, pharmaceutical manufacturers may not export drugs used for executions in the United States unless they have a special permit showing that the export is not for executions. Meanwhile, a prison warden back in the United States told the press, “I am beginning to think drug companies and suppliers are not real happy to have to supply us for this use.”

The result of all this is that nowadays about the only way for death penalty states to get sodium thiopental for executions is to get it on the international black market. India may be involved; an operation running out of a “gritty London neighborhood” may be, too. And because states are getting sodium thiopental on the black market, there are legitimate questions about whether the shipments that make it to the United States meet minimum purity standards—not to mention the fact that most states' lethal injection statutes assume that the drugs come from some approved, or appropriate, or at least not illegal, source.

Because states are importing the drug, often illegally, the Food and Drug Administration has also become involved. It tried not to be. The FDA first took the position that death penalty drugs weren't its problem. According to the FDA, it was charged with regulating drugs “to protect public health” and, well, drugs to kill people are definitely not for public health, so the whole enterprise was outside the ambit of its authority.

But a federal judge disagreed, finding that the FDA had “arbitrarily and capriciously” abused its discretion in refusing to review death penalty drug imports. So now the FDA is asking states to turn over their stocks of sodium thiopental for its review and approval. Thus far, South Dakota has refused. California too.

The United States Drug Enforcement Agency has had better luck. Citing “questions about how the drug was imported,” the DEA seized Georgia's entire supply of sodium thiopental in the spring of 2011, effectively preventing executions in the state. It then seized Kentucky and Tennessee's supplies too, exacerbating shortages already plaguing states itching to execute but without the drugs to do so.

That's when the whole thing started to unravel. As it turns out, Kentucky had reached out to more than two dozen states to obtain sodium thiopental before ultimately buying it from Georgia. Tennessee had shared its supply with Georgia and Arkansas, and Arkansas had shared its supply with Oklahoma, Mississippi, and Tennessee.

And then there is California, which reportedly “scoured the nation” for sodium thiopental before finally getting it from Arizona. In brokering the deal, a California prison official actually sent an email to his Arizona counterpart thanking him and adding, completely oblivious to the irony, “You guys in AZ are life savers.” Sometimes truth really is stranger than fiction.



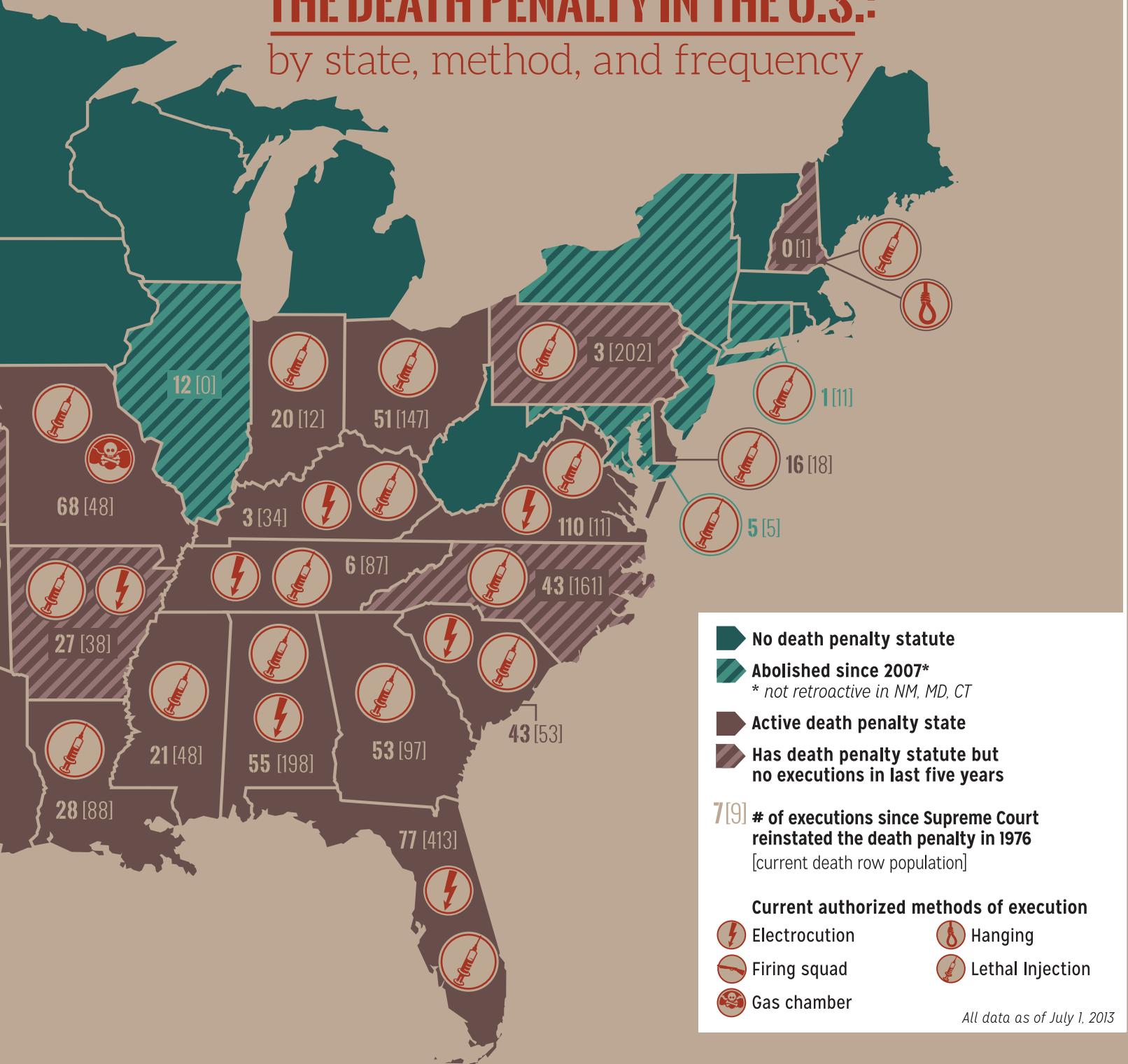
So what can states determined to use the death penalty do? The chief alternative to sodium thiopental is a drug called pentobarbital, and states have increasingly turned to this drug for its executions instead. But here, too, there is a hitch.

The sole supplier of pentobarbital in the United States is a Danish company called Lundbeck, and Lundbeck is likewise strongly opposed to the use of its

drug in lethal injections, claiming it is “against everything we’re in business to do.” The drug is intended to treat epilepsy and euthanize animals, Lundbeck maintains, and is not safe for use in untested ways, like human executions. Lundbeck has asked states not to use its drug in lethal injections, to no avail. The company has now turned to end-user clauses to prevent such use.

THE DEATH PENALTY IN THE U.S.:

by state, method, and frequency



What does all this mean for death penalty states? One thing it means is that a number of states simply aren't executing—not because they don't want to, but because they can't. It also means that, once again, states are on the hunt for a new paralytic to use in lethal injections.

Missouri recently changed its lethal injection protocol to include a drug called propofol, the drug that caused Michael Jackson's death. The state will likely have

to try again, however, since the second of the only two domestic suppliers of propofol has now said it will not accept orders of the drug from U.S. corrections departments. Virginia has turned to a drug called rocuronium bromide, which 42 states have banned as a paralytic for euthanizing animals because it may cause excruciating pain. Texas, too, has switched its drug protocol due to supply shortages, but it then adopted a non-disclosure

All data as of July 1, 2013

policy for all lethal injection drug information, so we don't really know what drugs it's using.

Not only is the search for death penalty drugs gumming up the execution process, but it is also requiring states to rewrite their statutes, which is causing problems of its own. Arkansas, for example, amended its lethal injection statute to allow the department of corrections to choose "one or more chemicals" for use in lethal injection, but its Supreme Court struck down the law, holding that such "unfettered discretion" in the executive branch did not pass constitutional muster.

And then there is California, which cannot seem to get an execution to save its life. Having just revised its three-drug protocol to remedy constitutional deficiencies in its previous lethal injection procedure, California's Supreme Court has now declared that its protocol is again deficient, in part because it failed to consider a one-drug option. So back to the drawing board California goes.

That brings me back around to cost. As one might imagine, the dearth of death penalty drugs has had a dramatic effect on the cost of lethal injections. In 2012, states paid 15 times more for death penalty drugs than they paid in 2011, and in 2011, they paid 10 times more than they had paid in years past.

But more importantly, the dearth of death penalty drugs has thrown a wrench into the states' ability to carry out the death penalty at all, which has fed into an even larger death penalty debate about cost.

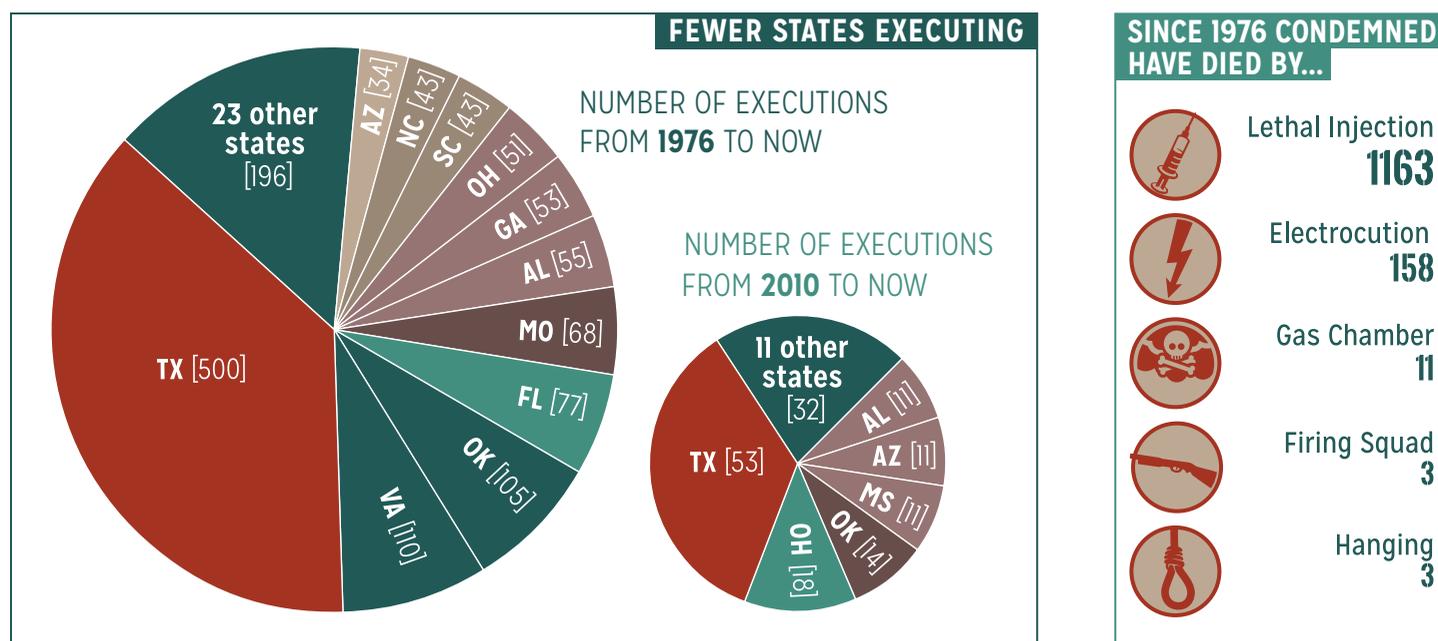
In each of the states that have abolished capital punishment over the past several years, the cost of the death penalty—or more precisely, what the state was getting for that cost—played a critical role in the decision.

Illinois, for example, estimated that it spent some \$100 million on the death penalty in the 10 years prior to its abolition, and it had executed no one during that time. New York estimated that it spent \$170 million on the death penalty since reinstating it in 1995, while New Jersey's estimated cost since reinstatement in 1982 was \$253 million—and neither of those states had a single execution to show for it. New Mexico's governor cited economic considerations in signing his state's abolition bill as well.

In Connecticut, cost does not appear to have been a driving factor in abolition, but the "unworkability" of the death penalty was. The state executed only one person in the last 50 years, and he had volunteered.

In Maryland, the latest state to abolish the death penalty, the governor supported abolition in part because the death penalty cost the state three times more than a sentence of life without the possibility of parole—and there wasn't much difference in result.

Californians narrowly voted to keep the death penalty this past fall—a referendum proposing to abandon capital punishment was defeated 53 to 47 percent—and cost was a dominant theme in that debate. With the largest death row in the country, California's death penalty costs are astronomically high. A recent study estimated that the state spends around \$137 million a year on its death penalty



(although other sources have put that figure higher) and that it would cost California around \$11.5 million a year to maintain a penal system with a maximum punishment of life without the possibility of parole instead.

Thus far, California has spent around \$4 billion on its death penalty since the 1970s and has only 13 executions to show for it—an average cost of more than \$300 million per execution. That’s a lot of health care. A lot of education. A lot more police officers on the streets.

The fact is that states are abolishing the death penalty because they don’t get much bang for the buck. Only one in 500 murders results in a death sentence, and those that do rarely lead to an execution. In California and many other death penalty states, more people die on death row of natural causes than by the executioner’s hand. In practice, the death penalty tends to be life without parole—we’re just paying lots more for it.

In these austere times, the fact that the death penalty is so expensive to maintain, and so hard to carry out, is changing the script of the death penalty debate. Demurring on the death penalty is no longer about being “soft on crime.” It is about being “smart on crime.” It makes no sense to have a death penalty that costs millions to maintain but is almost never used.

And that, in turn, has created the political room to abandon death. Voting against the death penalty used to be political suicide. Now it is couched in terms of fiscal responsibility. Because it saves the taxpayers money, it is the right thing to do.

Money is the new morality.

I, for one, view this development with mixed emotions. There are now more than 140 people who have been exonerated while on death row—more than 140 people who the state claimed the right to execute and whose innocence was later proven. By and large, that hasn’t moved us.

Study after study has shown that the death penalty today is as arbitrary and capricious—and, let’s face it, racially discriminatory—as it was in 1972, when the Supreme Court in *Furman v. Georgia* temporarily abolished it. Death today turns more on the victim’s race, the quality of appointed counsel, and random factors like the county where the crime was committed, than it turns on the severity of the crime or the dangerousness of the criminal. But none of those arguments has moved us.

In the end, I suspect abolitionists will take a money argument that works over a moral argument that doesn’t. What most people don’t know is the backstory of how Big Pharma is helping them do it. ■

Corinna Barrett Lain is professor of law and associate dean of faculty development. This article derives from “On the Virtues of Thinking Small,” which appeared in the Winter 2013 issue of University of Miami Law Review.

